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Matter of M.S.
2023 NY Slip Op 50819(U) [79 Misc 3d 1236(A)]
Decided on August 4, 2023
Family Court, New York County
Kingo, J.
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Decided on August 4, 2023

Family Court, New York County

**In the Matter of a Juvenile Delinquency Proceeding
Under Article 3 of the Family Court Act
M.S. a person alleged to be a juvenile delinquent, Respondent.**

Docket No. D-04240-23

Philip John Simonelli, Esq. for the Presentment Agency

Carmen Elizabeth Martinez, Esq. for the Presentment Agency

Cynthia Luz Rivera, Esq. for Respondent

Hasa A. Kingo, J.

NOTICE: PURSUANT TO SECTION 1113 OF THE FAMILY COURT ACT, AN APPEAL MUST BE TAKEN WITHIN 30 DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT, 35 DAYS FROM THE OF MAILING OF THE ORDER TO THE APPELLANT BY THE CLERK OF THE COURT, OR 30 DAYS AFTER SERVICE BY A PARTY OR ATTORNEY FOR THE CHILD UPON THE APPELLANT, WHICHEVER IS EARLIEST.

In the instant matter, M. S. ("Respondent") stands before this court charged with possessing a loaded .380 Smith & Wesson pistol ("the pistol"). The pistol was recovered from the ground underneath a car where Respondent threw it following a chase on foot by Detective John Avellino ("Avellino"). The pistol was later found to be loaded and operable. Following motion practice, this court granted Respondent's request for a pre-trial *Mapp/Dunaway* hearing [*2] to determine whether the police acted lawfully in their pursuit of Respondent, their subsequent apprehension of him, and in their recovery of the pistol.

Here, the Presentment Agency has the initial burden of showing, by credible evidence, the lawfulness of the police conduct (*People v Ramirez-Portoreal*, 88 NY2d 99 [1996]; *People v Wise*, 46 NY2d 321 [1978]; *People v Whitehurst*, 25 NY2d 389, 391 [1969]; *People v Berrios*, 28 NY2d 361, 367 [1971]; [People v Hernandez](#), 40 AD3d 777, 778 [2d Dept. 2007]; [People v Moses](#), 32 AD3d 866 [2d Dept. 2006]). In evaluating the police action, the court must determine whether it was justified at its inception and whether it was reasonably related in scope to the circumstances present at the time (*People v DeBour*, 40 NY2d 210, 215 [1976]). If the Presentment Agency satisfies this initial burden, the Respondent "bears the ultimate burden of proving that the evidence should not be used against him" (*People v Berrios*, 28, NY2d 361, 367 [1971]).

In this case, Avellino testified that on March 8, 2023, in the vicinity of 2459 8th Avenue, he spotted Respondent walking with another individual while looking around in multiple directions. Avellino then testified that at the time of his initial observation, he was in an unmarked vehicle seated in the rear driver's side seat. Avellino further testified that he was in plainclothes but was wearing a vest and had his shield situated at his hip. Although Avellino could not recall whether his view was unobstructed by a nearby bus lane and surrounding vehicles, he recalled that he could see what appeared to be an L-shaped object in Respondent's right pocket. Notably, the date of Avellino's observation was amidst the dead of winter, and this court took judicial notice that the temperature that day ranged anywhere from 30 degrees to 41 degrees. As such, Avellino conceded that most individuals he observed walking were wearing large jackets. Indeed, Avellino testified that at the time Respondent was wearing a black bubble jacket. After seeing Respondent and what he claimed was an observable L-shaped object, Avellino mentioned that the vehicle stopped and that he approached Respondent without reference to who he was. Shortly thereafter, Respondent ran away and was pursued by Avellino. Eventually Avellino caught up to Respondent and,

separated by two car lengths, testified that he heard Respondent drop an object that made a "metal clink." Thereafter, Avellino apprehended Respondent and placed him in handcuffs. Then, Avellino testified that he frisked Respondent and was unable to recover a firearm. Avellino then enlisted the help of one of his fellow officers who looked underneath the vehicle while Respondent was detained. The officer subsequently recovered the pistol that is the subject of the instant proceeding.

The Presentment Agency presented a video, received in evidence as Presentment Agency Exhibit One (1), that depicted Respondent discarding the pistol. On cross-examination of Avellino, Respondent's attorney discredited Avellino's observation of the pistol. Among other things, Respondent's counsel highlighted that Avellino could not have observed the pistol in Respondent's right pocket since Respondent was wearing a black bubble jacket in winter that made it impossible for Avellino to discern an object of any shape within Respondent's coat. The court credits this inference. Indeed, Avellino conceded that he saw nothing hanging out of Respondent's pocket. Moreover, Avellino conceded that the object located within Respondent's right pocket may well have been a stapler or phone rather than a gun. But even setting that aside, it is implausible to the court that Avellino could have observed an L-shaped object within a [*3] bubble jacket pocket. Avellino conceded that the pistol was not located in Respondent's waistband. That is notable here. Indeed, in *DeBour*, the Court of Appeals held that "[t]he location of the bulge is noteworthy because unlike a pocket bulge which could be caused by any number of innocuous objects, a waistband bulge is telltale of a weapon" (*People v. DeBour*, 40 NY2d at 219, *supra*). Here, setting aside the fact that it was improbable in winter that Avellino could have discerned a bulge in Respondent's right jacket pocket, the bulge itself could have been any number of objects.

Following Avellino's testimony, Respondent's counsel called Devin Chee ("Chee"), an investigator within the Legal Aid Society, to the stand. Chee testified credibly that he performed an experiment during which he attempted to replicate the weight and relative size of the pistol recovered through use of a water bottle received in evidence by the court. Although the water bottle exceeded the dimensions of the pistol recovered, the court received in evidence photographs that revealed that a water bottle of similar weight and greater size when compared to the pistol recovered would not have been identifiable by mere observation of the right pocket of Respondent's bubble jacket. To be sure, a water bottle of similar weight to the pistol, and that was significantly larger than the pistol, was not identifiable by mere

observation when placed within the bubble jacket. Photographs received in evidence by the court confirm this seminal observation. This evidence, among other things, discredited Avellino's testimony. Although Avellino testified that he has participated in, or assisted in, numerous arrests, Avellino's testimony rang hollow in the face of the ample evidence submitted by Respondent.

At summation, the Presentment Agency argued that Avellino testified credibly and that he had reasonable suspicion to believe that Respondent had committed a crime based on Respondent's furtive movements and subsequent flight when approached. Ignored in the Presentment Agency's analysis was the fact that all the cases cited by the Presentment Agency in support of that proposition were rooted in circumstances where a firearm was observed in the waistband region of a person rather than within a pocket. Here, reference to *DeBour* once again underscores this point. An item placed in a pocket is materially different from an item placed in one's waistband. Respondent's counsel capitalized on this fact during her summation. And this critical fact is seminal to this court's analysis. Indeed, based on the object allegedly contained within Respondent's pocket, Avellino may have had an objective, credible reason to request information from Respondent (*see People v. DeBour*, 40 NY2d at 223, *supra*) and to ask him to remove his hands from his pockets as a precautionary measure (*see Matter of Anthony S.*, 181 AD2d 682, 682-683 [1992], *lv denied* 80 NY2d 753 [1992]). However, Avellino did not request information from Respondent as he should have. Rather, Avellino immediately concluded that Respondent, a black man, had participated in conduct indicative of illegality. This conclusion was without basis within the record. Indeed, Avellino was not justified in pursuing Respondent and forcibly seizing him after chasing him. Respondent's flight, when accompanied by nothing more than the presence of an object in his pocket that was arguably unidentifiable, or admittedly could have been numerous possible objects (even at close range), did not raise reasonable suspicion that he had a gun or otherwise was involved in a crime (*see People v Holmes*, 81 NY2d 1056, 1057-1058 [1993]; *People v Prochilo*, 41 NY2d 759, 763 [1977]; [People v Reyes](#), 69 AD3d 523, 525-526 [1st Dept. 2010], *appeal dismissed* 15 NY3d 863 [2010]).

The fact that Respondent discarded the pistol while Avellino was in hot pursuit does not change this analysis. Indeed, the pistol was tainted by the improper police action and therefore is subject to suppression (*see People v Holmes*, 181 AD2d 27, 31-32 [1st Dept. 1992], *aff'd* 81 NY2d 1056 [1993]). Contrary to the Presentment Agency's argument,

Respondent did not make a conscious and independent decision to abandon the pistol, but instead discarded it in direct response to the pursuit by Avellino ([see *People v Pirillo*, 78 AD3d 1424](#), 1426 [1st Dept. 2010]). To be sure, Respondent's flight alone or even his flight in conjunction with equivocal circumstances that might justify a police request for information is insufficient to justify pursuit (*see People v. Holmes*, 81 NY2d at 1058, *supra*; [People v. Cadle](#), [71 AD3d 689](#) [2d Dept. 2010]; *People v. Hope*, 237 AD2d 885 [4th Dept. 1997]). Notwithstanding, this court observes, as other courts have, that flight "combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, could provide the predicate necessary to justify pursuit" (*People v. Holmes*, 81 NY2d at 1058, *supra*).

Under the circumstances of this case, however, Respondent's awareness of his surroundings, even coupled with his flight from Avellino, did not constitute specific circumstances indicative of criminal activity so as to establish the reasonable suspicion that was necessary to lawfully pursue Respondent ([see *People v. Cadle*, 71 AD3d 689](#), *supra* ; [see also *People v. Stevenson*, 7 AD3d 820](#) [2d Dept. 2004]; *People v. Moore*, 176 AD2d 297 [2d Dept. 1991]). Accordingly, since Avellino's pursuit of Respondent was unlawful, and Respondent's disposal of the weapon during the pursuit was precipitated by that illegality and was not attenuated from it ([see *People v. Cadle*, 71 AD3d 689](#), *supra*; [see also *People v. Lopez*, 67 AD3d 708](#) [2d Dept. 2009]; *cf. People v. Boodle*, 47 NY2d 398 [1979], *cert. denied* 444 U.S. 969), the discarded pistol must be suppressed. Without that evidence, there is insufficient evidence to prove Respondent's guilt and, therefore, the petition must be dismissed ([see *People v. Kevin W.*, 91 AD3d 676](#) [2d Dept. 2012]; [People v. Smalls](#), [83 AD3d 1103](#) [2d Dept. 2011]; *see also People v. Rossi*, 80 NY2d 952 [1992]).

In view of the totality of circumstances, the Presentment Agency has failed to sustain its burden of showing the legality of the police conduct at issue. By contrast, Respondent's counsel has credibly challenged the Presentment Agency's assertions. When viewed in its entirety, Detective Avellino's testimony was incredible and inconsistent, and insufficient to sustain a finding that he acted reasonably and in accord with *People v DeBour*, 40 NY2d 210, *supra*, and its progeny. Accordingly, Respondent's request to suppress the pistol at issue is granted. Based on the foregoing, the instant petition cannot proceed as a matter of law. As such, the petition is dismissed, with prejudice.

The foregoing constitutes the decision and order the court following a hearing held on August 3, 2023, the substance of which is incorporated by reference.

August 4, 2023

HON. HASA A. KINGO

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